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In the Supreme Court of the United States

October Term, 1977

No. 77-728

THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
and
NELLIE MAE WEBB, et al.,
Respondents.

RESPONDENTS' (WEBB, ET AL.) BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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PRIESMAN GRAPHICS—OMAHA, NEBRASKA

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OPINIONS BELOW

The Opinions below are adequately described in the Petition at page 2.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at page 2.

QUESTION PRESENTED

Whether the Court of Appeals' holding that the Omaha School District was segregated *de jure* is consistent with the standards enunciated in *Village of Arlington Heights*.

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional provisions and statutes are adequately set forth in the Petition at page 3.

STATEMENT

This is a school desegregation action concerning the School District of Omaha, Nebraska. The Court of Appeals, in reversing the District Court decision (App., pp. 100-135)*, held that application of correct legal standards and consideration of all relevant evidence warranted a finding that the system was segregated *de jure*. The fact of student segregation was undisputed (App. pp. 43,100). The principal issue concerned whether this segregation "was brought about or maintained by intentional state action" (App. p. 100).

*The method of citation in this brief is as follows: App. refers to the appendix filed with this Court; A, RA and SA refer to the various appendices filed at different stages of this case with the Court of Appeals and the page number in the respective appendix follows the initial; Px, Dx, and Ix, refer to Plaintiff's exhibit, Defendant's exhibit and Intervenors' exhibit respectively, and Tr refers to a trial transcript cite.

A reading of the original Court of Appeals' opinion reveals that at least eight factors played a part in its reversal of the District Court.

(1) The Court of Appeals' application of a different standard on the issue of segregative intent (App. pp. 105-110).

(2) The Court of Appeals' conclusion that the trial court made several errors on faculty segregation issues, namely, (a) the District Court's incorrect view of the duration of the practice of deliberate faculty segregation which it found (App. pp. 90, 102-03, 111-12); (b) the District Court's error in viewing a good faith reliance on a "role model" theory as "entitled to some weight in any ultimate conclusion regarding segregative intent . . ." (App. pp. 90, 113 at n. 14); and (c) the District Court's failure to give weight to the long-standing pattern of deliberate faculty segregation in assessing segregatory student assignment practices (App. pp. 112-13 at n. 13).

(3) The Court of Appeals' giving of appropriate weight to evidence of a pattern of student assignment practices having a segregatory effect, *i.e.*, optional and dual zones (App. pp. 119, 125-26), a transfer policy (App. pp. 114-17), school construction (App. pp. 123-24, 125), the selective

implementation of a grade conversion policy (App. pp. 118-20), unequal utilization of facilities (App. p. 125) and the deterioration of Technical High School (App. pp. 124-29).*

(4) The Court of Appeals' giving of weight to explicit evidence of racial intent (App. pp. 113 at n. 14, 117-18 at n. 20, 120, 125-126 and n. 40), which the District Court largely ignored.

(5) The Court of Appeals' giving of weight to evidence that segregatory practices were generally inconsistent with system policies, including the neighborhood school policy (App. pp. 117-18 at n. 20, 119-20, 124 at n. 28, 125), which the District Court largely ignored.

(6) The Court of Appeals' giving of weight to important findings made by the District Court in its opinion denying preliminary relief but ignored in the opinion on the merits (App. pp. 115 at n. 17, 123 at n. 26).

(7) The District Court's making of four "clearly erroneous" factual findings (App. pp. 116, 121, 122; compare 126-27 and 73).

*The Court of Appeals' reference to "the deterioration of Tech High School" referred to a series of actions including the dropping of electronics from the curriculum and the transferring of the instructor to a neighboring white school, "substituting courses aimed at meeting black stereotypes" (footnote omitted), and disproportionately placing special education students in Tech High, many of whom "were disruptive and presented disciplinary problems" (App. p. 126).

(8) The District Court's apparent reliance on the "separate but equal doctrine" (App. pp. 127-28 and n. 31).

After finding that the system was illegally segregated, the Court of Appeals directed desegregation of faculty and students in accord with specific guidelines (App. pp. 129-33). This Court denied the School Board's first Petition for a Writ of Certiorari, 423 U.S. 946 (1975).

Subsequent to the approval of the desegregation plan by the District Court (App. pp. 139-46) and the Court of Appeals *(en banc)* (App. pp. 172-75), this Court granted the School District's Petition for a Writ of Certiorari and remanded the case to the Court of Appeals "for reconsideration in light of *Village of Arlington Heights* and *Dayton* . . ." *School District of Omaha v. United States,* ___ U.S. ___, 97 S.Ct. 2905 (1977).

Upon reconsideration before the Court of Appeals, the Court *en banc* noted:

> "We have again examined our holding of intentional segregation in light of *Arlington Heights v. Metropolitan Housing Development Corp.*, supra, and conclude that the evidence is clear that a discriminatory purpose has been a motivating factor in the School District's action . . ." (App. p. 177).

The School District's present Petition seeks reversal of this determination.*

*In accordance with this Court's remand Order, the Court of Appeals also reconsidered its decision on remedy in light of *Dayton* and upon reconsideration remanded the remedy issue to the District Court (App. p. 177).

ARGUMENT

I.

The Record, applied in light of the *Village of Arlington Heights* criteria warrants the determination of intentional segregation.

The Petition argues (pp. 19-21) that this is the case to decide whether the legal principles applied below allow a school system to be found illegally segregated because use of a pure neighborhood assignment plan combines with residential segregation to produce pupil segregation. The Petition attempts to convey the impression that the Court of Appeals superimposed a bald presumption without regard to the facts to produce a finding of segregative intent. However, such an approach is manifestly improper. The record here, applied in light of the criteria set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977), and Rule 52(a), Fed. R. Civ. P., warrants a finding of intentional segregation. The System's argument is thus directed to a hypothetical case, not this one.

A. Faculty Segregation

The system contends that pupil segregation resulted from residential factors (Petition, p. 5). It is relevant, therefore, to begin by analyzing faculty assignment, a major area of school administration, and one where the system had absolute control because administrators assigned teachers and principals. Compare *Keyes v. School District No. 1, Denver,* 413 U.S. 189, 206-09 (1973) (proof of intentional pupil and faculty segregation in substantial part of system creates a *prima facie*

case of segregative design as to other conduct having a segregatory impact).*

The trial court found that for more than 20 years, "from approximately 1940 through the early 1960's," the system intentionally segregated faculty, "placing black teachers in majority black schools only, and also . . . confining qualified black secondary teachers to the elementary grades" (App. p. 90). The Court of Appeals held that the District Court erred in failing to rule that intentional faculty segregation continued through trial (App. p. 111-12). In reaching the conclusion that the pattern extended for more than 30 years, through trial, the appellate court relied in part on (a) the assignment of 67 of 81 additional black teachers hired from 1963 to 1969, 82.7%, to the small number of majority black schools, and (b) the overall segregated pattern as of trial, including that in 1972-73, one majority black elementary school had more black faculty than all 62 elementary schools enrolling less than 25% black pupils (App. p. 102-03, 112).

Other evidence of record is revealing:

The system's first black professional staff member, since the early 1900's, began work in 1939-40. However,

*The Court of Appeals reasoned that intentional faculty segregation "is strong evidence that racial considerations have been permitted to influence the determination of school policies and practices" because "[t]eacher assignment is so clearly subject to the complete control of school authorities . . ." (App. p. 112-13, n. 13). See also *Kelly v. Guinn,* 456 F.2d 99, 107 (C.A.9, 1972) (same), *cert. denied,* 413 U.S. 919 (1973); *United States v. Board of School Commissioners,* 474 F.2d 81, 87 (C.A.7, 1973) (same), *cert. denied,* 413 U.S. 920 (1973); *Davis v. School District of City of Pontiac,* 443 F.2d 573, 576 (C.A.6, 1971) (same), *cert. denied,* 404 U.S. 913 (1971).

she was denominated a "counselor for colored pupils" and "adviser to Negro children," serving only black students [A. 218-22, 1004-17; Ix. 488, p. 5].

In 1940-41, the system employed one black teacher at each of its two majority black elementary schools (App. p. 111), although one was trained and had experience as a secondary school language teacher [A. 231, 244-46, 1002-04].* In the next 21 years, the number of black faculty increased to 57, all of whom were assigned to majority black schools. Thus, in 1961-62, all 57 black faculty members taught in seven majority black schools; 80 majority white schools and one majority black school had not one black teacher (App. p. 111).

As there was no majority black secondary school in Omaha until Mann Junior High opened 71% black in 1959-60, no black person taught at that level until that year, when seven black persons were assigned to Mann. In 1963-64, two black teachers were assigned to Technical High when it first became majority black (51% black); a third black teacher was assigned to North High (9% black) (App. p. 111). In the previous year, 1962-63, the teaching staff of the system's five high schools consisted of 434 white persons [Px. 79].**

*This teacher's supervisor evaluated his first year, in part, as follows: "Do you think this teacher is sufficiently promising to be continued on the corps for another year? Yes, if we have to have Negro teachers" [A. 1001].

**In approximately August 1954, Mrs. Wilda Stevenson, a black person, applied for a secondary business education position. She had majored in commercial education, had 10 years' practical experience in this field, and had only a state secondary education certificate. In January 1955, she received an M.A. in education. In the fall of 1955, she was employed in Long Elementary (93% black), where she remained until 1959, when she was reassigned to Mann Junior High which opened that year (71% black). Mrs. Stevenson did not receive a high school position until 1964 [A. 477-86, 737-38].

The first assignment of a black teacher to a majority white school was made in 1962-63. In that year, one (of 67) black teacher was assigned to teach at J. P. Lord, a facility for physically handicapped students [A. 362-63, 735-38; Px. 82].

The term "voluntary" does not aptly describe the departure from *total* segregation. In the 1950's, the principals of an elementary school which had an all-black faculty and Technical High communicated with the superintendent in unsuccessful efforts to secure integrated faculties [A. 170-71, 248-50, 994-96]. In 1959, a local civil rights organization protested the segregated pattern.* In the same year, 1959, an Urban League employee made direct protests in meetings with system officials. Sandy Perry testified that he first met with the system's chief personnel officer, Fred Hill, and Owen Knutzen, Omaha's superintendent of schools as of trial, and at present. Perry testified that, in response to his expression of concern about the absence of black high school teachers, the personnel director stated that "there would be a violent reaction in white neighborhoods if blacks were assigned there," and that he felt "that we would have to be ready, or the public school system would have to wait until these neighborhoods were

*Members of the DePorres Club protested hiring and assignment practices by distributing many leaflets, and picketing at the central office and certain schools. One leaflet stated in part [A. 984]: "LITTLE ROCK?/NO/OMAHA/ In the Omaha Public School System, No Negro Teachers in High Schools/ Negro teachers Segregated To Near North Side." The efforts of the DePorres Club were reported in newspapers and on television and radio [A. 455-65, 983-84; Ix. 427, pp. 4-6, 9-11; Tr. 491-92].

ready and white parents were ready to accept black faculty" [A. 267-68, 358-59]. Perry further testified that "Dr. Knutzen [the current superintendent] stated that they could not assign the staff to white schools at the time that I was mentioning for the same reasons" (A. 269, explanation added.) During testimony at the trial, Dr. Knutzen "surmize[d]" that he had met with an Urban League official, but could recall no specifics [Tr. 650-51].*

In July 1963, Omaha's Mayor convened a bi-racial committee, charging its members in part: "Negro teachers should be hired in high schools" [A. 912]. The education sub-committee's April 1964 report recommended efforts to "actively recruit teachers of the minority groups for positions at all levels" and "[t]hat minority group teachers be employed outside their particular area as a matter of procedure to establish intercultural understanding" [A. 914].

Despite the recommendation of the Bi-Racial Committee, the system continued to concentrate black

*Other evidence supports the view that segregatory assignments were based upon incorporation of racially discriminatory white community perceptions. (1) Perry testified to a similar statement by the then Superintendent in 1959. ("[H]e could not assign the teachers to other neighborhoods for the reasons that there might be resistance in white neighborhoods or resistance among white faculty in other schools.") [A. 270-71, 289-90]. (2) George Crenshaw, a black person, was hired as an elementary teacher in 1965, although he was certified only for grades 7-12 and applied for a position at that level. Crenshaw testified that in 1966 the system's chief personnel officer attributed the lack of blacks at the secondary level to "a concern by the system as to whether or not the white parents and students would graciously receive a black instructor or coach . . ." [A. 374, 490-91]; (3) In responding to a 1966 ACLU request for faculty desegregation, the system's superintendent stated in part that "[t]he climate of our community has been increasingly receptive" (App. p. 113, n. 14).

teachers in majority black schools. In 1968-69, the fifth school year after the report, 89% of the black teachers were assigned to majority black schools. In that year, all 39 black junior high school teachers were assigned to Mann and Technical, the only majority black junior high schools. The 11 majority white junior high schools did not have even one black faculty member [A. 735-38]. As the Court of Appeals found, continued segregatory assignments substantially undermined the effect of the system's affirmative recruitment program (App. p. 112).

In April 1972, the Department of Justice sent to the system the statutory notice letter commencing the proceedings which ultimately resulted in this suit. In summarizing the "essentials of the allegations," the letter stated, in part: "4. That teachers and staff members are assigned to schools on the basis of their race; . . ." [Dx. 1]. In 1971-72, the school year in which the letter was received, there were 202 black faculty, 149 of whom (73.8%) were assigned to majority black schools [A. 735-38]. Indeed, one majority black elementary school (Lothrop) had more black faculty (20) than all 61 majority white elementary schools combined (18) [A. 735-36; Px. 2]. Through 1971-72, 46 majority white schools had never had a black faculty member [Pxs. 2, 82].

The pattern of assignment of principals was similar. The system's first black principal was assigned in 1947-48 to Long, which had one white and 448 black students. With his assignment, Long received an entirely black full-time faculty, a condition which continued

until his departure in 1959. Then, Long was assigned a white principal, and its faculty became majority white. Long's black principal was reassigned to majority black Lothrop elementary, which also experienced a considerable increase in black faculty [A. 232-39; Pxs. 79, 82; Dx. 304]. As of trial, 9 of 12 black principals were assigned to majority black schools [A. 251, 262].

The applicability of the *Village of Arlington Heights* criteria here is clear. The statistical pattern of segregation is "unexplainable on grounds other than race. . . ." *Village of Arlington Heights, supra,* 429 U.S. at 266. A review of "historical background" reveals "a series of official actions taken for invidious purposes." *Village of Arlington Heights, supra,* 429 U.S. at 267. This "series of official actions" included the hiring of a "counselor for colored pupils," the long-standing assignment of black people only to majority black elementary schools, the confining of qualified black secondary teachers to elementary schools, and the segregatory assignment of principals. And, most significantly, there is "direct evidence of intent . . ." in the form of "contemporary statements," oral and written, by "decisionmak-[ers]. . . ." *Village of Arlington Heights, supra,* 429 U.S. at 267, 268.

As stated by the Court of Appeals, the pattern of intentional racial discrimination in faculty assignment "is strong evidence that racial considerations have been permitted to influence the determination of school policies and practices" (App. p. 112-13, n. 13). "[W]here, as here, the case involves one school board, a finding of intentional segregation on its part in one portion of a school system is highly relevant to the issue of the

board's intent with respect to other segregated schools in the system." *Keyes, supra,* 413 U.S. at 207. Moreover, the evidence showing that faculty segregation was designed to accommodate white community perceptions is particularly relevant given the nature of segregatory student assignment practices summarized below. Practices such as optional zones, the special transfer policy, the delay and manipulation of the grade reorganization policy, and the operating of Technical High well under capacity while adjoining white schools were extremely overcrowded — allowed white pupils to escape attendance at identifiably black schools. The Court of Appeals explicitly related segregatory pupil assignment practices to white sentiment, stating:

> "Indeed, we find the elaborate system of delayed conversion, optional zones, and the closing of Tech Junior High to be inexplicable unless in furtherance of a single coherent policy: the unwillingness to assign white students to schools perceived as black, the 'neighborhood school' or any other policies notwithstanding (App. p. 122, n. 25).

B. Student Transfers

The system's transfer policy allowed students to attend schools outside their neighborhoods (App. p. 114). "The evidence presented on transfers granted in 1970-71 and 1971-72 shows that the effect of the transfer policy on the majority and predominantly black schools was profound" (App. p. 116). In those years, a significant percentage of the white students assigned to identifiably black elementary and intermediate schools transferred to white schools (App. p. 116). "Virtually all white South High alone received 260 white students from the Tech/Central zone in 1970-71, and 315 such students in 1971-72 (App. p. 116).

In addition to noting the profundity of "effects" of the transfer policy, the Court of Appeals relied on the following facts in making its determination:

(a) the District Court had found that the School Board granted transfer requests which were explicitly based on racial factors (App. p. 117, fn. 20);

(b) the School District had opposed a bill in the Legislature which would have prohibited racially segregative transfers in the Omaha School District. *Id.;*

(c) the School District had departed from its stated policy prohibiting transfers to a school which was overcrowded in allowing hundreds of white students to transfer from under-utilized Technical High School to seriously overcrowded South High. *Id.*

The District Court had completely overlooked the latter two factors in reaching its ultimate determination on the special transfer policy. Furthermore, the Court of Appeals noted that the District Court, in finding no discrimination in the transfer policy's administration, had ignored its own finding in its opinion denying a preliminary injunction (App. p. 115, fn. 17).

Significantly, the failure of the School District to check the segregative effects of the transfer policy* (and, in fact, its opposition to efforts to accomplish the

*The school system ignored repeated warnings of the segregative impact of the transfer policy, including a report in 1969 commissioned by the United Community Services, which noted that "Because the transfer policy does not prevent transfers that harm integration, schools like Tech High experienced an exodus of white students" (A. 903).

same) was clearly inconsistent with its pronouncement in 1951 that:

> "Segregation, even though it is a result of residence rather than administration, is most undesirable educationally. Certainly it is a factor which must be taken into consideration in the redistricting of the elementary schools and in the location of new school structures" (App. p. 104, fn. 6).

C. Manipulation of the Grade Conversion Policy and Optional Zones

In 1950, the system began to modify grade structures, the primary goal being the conversion of K-8 schools to K-6 and the creation of junior high schools with grades 7-9 (App. p. 188). The conversion was achieved in a manner which minimized the necessity of assigning white seventh and eighth graders to the two identifiably black junior high schools: Mann and Tech. As the Court of Appeals noted, two basic techniques brought about this result: (1) delaying the conversion of predominantly white K-8 schools which would be logical feeders for Mann or Tech; and (2) granting options to the seventh and eighth graders in those converted schools to attend more distant identifiably white junior high schools, when the conversion did take place (App. p. 118-19). A third technique also played a role. The school system failed to convert several schools notwithstanding the junior high policy (See e.g., App. p. 120).

As of 1963-64, 14 of the original 46 K-8 schools remained K-8. Seven were located nearest to junior high schools other than identifiably black Mann and Tech. These seven schools were converted to K-6 in 1964-65, and all or part of their zones were assigned exclusively

to one or more nearby junior high schools. "The remaining seven K-8 schools were . . . located so that the nearest junior high was Mann or Tech. All received unique treatment in the conversion process or were not converted" (App. p. 118, n. 21). As described above, this "unique treatment" involved delaying conversion to K-6 or failing to convert and creating optional attendance zones.

Among the effects of the conversion process were the promoting of segregation; giving students a choice of attending identifiably white and black schools; utilizing space in an unsound manner; students attending more distant schools, despite the neighborhood school policy; and housing seventh and eighth grade students in K-8 facilities not having "the enrollment or the facilities which the system considered appropriate for a junior high program" (App. p. 120). The Court of Appeals also noted that "the conversion of Yates had been delayed for one year because of parental opposition which [an] . . . assistant superintendent openly attributed to racial prejudice" (App. p. 120).

The Court of Appeals concluded:

> "[W]e find the elaborate system of delayed conversion, optional zones, and the closing of Tech Junior High to be inexplicable unless in furtherance of a single coherent policy; the unwillingness to assign white students to schools perceived as black, the 'neighborhood school' or any other policies notwithstanding . . ." (App. p. 122, n. 25).

D. School Construction

Of 39 new schools constructed from 1951-73, 37 served identifiably white or black populations (App. p.

123). More specifically, as enrollment at Technical High School declined to the point where it was largely abandoned and it became increasingly identifiably black, the system first built additions at identifiably white Benson and North, and later opened Bryan, Burke and Northwest as white schools (App. p. 125).

In assessing the evidence regarding school construction, the Court of Appeals applied this Court's decision in *Swann v. Mecklenberg Board of Education*, 402 U.S. 1, 21 (1971) and, in so doing, rejected the District Court's finding that "there was an absence of any segregative pattern" and gave the clear "pattern of school construction and abandonment . . . great weight" in determining the construction policy to be unconstitutional. Indeed, the pattern in this case is one which more than "generally tended to have segregative effect" and thus is more probative than that pattern relied on by the District Court (with approval by this Court) in *Milliken v. Bradley*, 418 U.S. 717, 726 (1974). (See App. p. 124, n. 27.)

The Court of Appeals further noted that the District Court failed to deal with its own finding in the preliminary relief stage of the case that assignments to the King Middle School, which opened identifiably black in 1973-74, were inconsistent with the neighborhood school policy (App. p. 123).

E. The Deterioration of Tech High School

Technical High changed from a heavily enrolled, predominantly white school in 1950 (17% black) to a largely empty (excess capacity of 1765), 96 per cent black school in 1973-74. The Court of Appeals analyzed

the "history" and found that this resulted from the interaction of many practices: operating Tech well under capacity while neighboring white schools were overcrowded (App. p. 125); adding additions to adjoining white high schools and opening new high schools identifiably white, while Tech was well under capacity (App. p. 125); assigning students to Tech by choice (App. p. 125-26); dropping extra-curricular activities and the electronics course and adding courses "the school board felt would be more adequately suited to the needs of Tech's increasingly black enrollment, including culinary arts and auto body shop . . ." (App. p. 126); assigning special education students disproportionately to Tech so that it became "[a school for special education] except in name" (App. p. 126-27); and assigning most black high school teachers to Tech (App. p. 128).

The Court of Appeals further concluded that the District Court had erred factually in concluding that Tech had not been a receiving school for special education students and disciplinary problems (compare App. p. 73 with App. p. 126-27).

The Court of Appeals searched the record for explanation as to why a school system, which was such a proponent of the neighborhood school, followed a course of action which so underutilized a fine educational facility and caused segregation at a school which was "located in a white neighborhood" (App. p. 125, 129). The record provided the answer: response to "perceived white community opposition to a compulsory attendance zone which would force them to send their children to a black Tech High" (App. p. 125). This explained the school system's failure to take corrective action consistent with the neighborhood school policy. The Tech Committee (consisting of school officials) had considered the possibility of establishing a compulsory attendance zone for Tech, but was concerned with the effect of the "racial overtones in establishing an attendance area" and, as a member of the Tech committee testified:

> "* * * 'a number of factors which will influence attitudes and create animosities would create reluctance [and] would tend to * * * create a poor atmosphere in the school community for pupils to learn and teachers to teach.' "

Asked if he was referring, in part, to racial prejudice, the assistant superintendent replied "yes" (App. p. 126, n. 30; see also, A. 987-88).

The Court of Appeals not only determined that the District Court had made erroneous findings and overlooked important evidence, but also found that the District Court focused on the quality of education at Tech and thus premised its ultimate conclusion on an erroneous view of the law, *i.e.*, the application of the doctrine of "separate but equal." But the Court of Appeals emphasized that:

> "This has not been the law since *Brown v. Board of Education,* and the law can never afford to bend in this direction again" (App. p. 128).

F. Reconsideration in light of *Village of Arlington Heights.*

As can be seen by this partial summary of the record, the determination of the Court of Appeals is indeed consistent with *Village of Arlington Heights.* The

Court of Appeals looked at the very kind of evidence specifically approved in *Village of Arlington Heights* as being relevant in a race discrimination case and found that the District Court had failed to do the same.

Thus, the use of the presumption in this case is buttressed by the Court of Appeals' reliance on evidence recognized as legitimate "evidentiary source[s]" for proof of racial discrimination.

The Court of Appeals considered the segregative impact of school policies and found as to some (in a manner consistent with *Village of Arlington Heights, supra*, 429 U.S. at 266) the effect to be determinative of intent, *e.g.*, faculty assignment (App. p. 110-13). The Court of Appeals reviewed the "historical background" of various policies, finding the same "reveals a series of official actions taken for invidious purposes," *Village of Arlington Heights, supra*, 429 U.S. at 267 (see, *e.g.*, Tech High, App. pp. 124-29) and also reviewed the "sequence of events leading up to the challenged decision," *Village of Arlington Heights, supra*, 429 U.S. at 267 (see, *e.g.*, delay of conversion of *Yates*, App. p. 120).

The Court of Appeals further noted "substantive departures" from stated policies which had segregative effects, *Village of Arlington Heights, supra,* 429 U.S. at 267 (*e.g.*, deviation from neighborhood assignment, App. p. 124, n. 28, and contravening capacity limitation of transfer policy to allow segregative transfers, App. p. 118, n. 20).

Finally, "contemporary statements . . . minutes . . . or reports" and other forms of direct evidence" were

recognized by this Court to be important evidentiary sources. *Village of Arlington Heights, supra,* 429 U.S. at 268. Such evidence stands as highly probative evidence and must be given great weight in light of the recognition that "there are very few school desegregation cases in which the defendants admit segregative intent" (App. p. 43), and the fact that "clever men may easily conceal their motiviation." *United States v. City of Black Jack,* 508 F.2d 1179, 1185 (C.A. 8, 1974), cert. denied 422 U.S. 1042 (1975). In this case, the record reveals, in part, a 1966 supreintendent's report suggesting with respect to segregation of faculty that "the defendants were effectuating the discriminatory designs of private individuals" (App. p. 113, n. 14), direct testimony that school officials had specifically acknowledged white community hostility as the basis of faculty segregation (see pp. 9-10, *supra*) an assistant superintendent admitting racial prejudice underlay decision-making as to Tech assignment policy (App. p. 126, n. 30), and admissions by an assistant superintendent and a board member that the Yates' conversion delay was a response to the same white community prejudice (App. p. 120 and SA 237). All of this evidence stands unrefuted. The board member whose comments on Yates are in the record never testified. Dr. Hlavac testified, but not in denial of his comments on Yates. The testimony of Sandy Perry as to his meeting with then Superintendent Burke and now Superintendent Knutzen (see p. 10, *supra*) was not contradicted in any way by Dr. Knutzen, who testified extensively as to other matters.

All of this evidence taken together and viewed in a manner consistent with *Village of Arlington Heights* supports the conclusion of the Court of Appeals that the

School District's policies are inexplicable "unless in furtherance of a single coherent policy: the unwillingness to assign white students to schools perceived as black, the 'neighborhood school' or any other policies notwithstanding" (App. p. 122, n. 25).

II.

The Foreseeability Standard.

While the foregoing section demonstrates that the petitioners' sole reliance on attacking the utilization of the foreseeability standard by the Court of Appeals is largely academic, it is clear that the use of this standard in this context is consistent with decisions of both this Court and other Courts of Appeal.

The principle that persons are presumed to intend the natural and probable consequences of their acts is grounded on a long history of decisions in this Court. In *Allen v. United States,* 164 U.S. 492 (1896), this Court in approving a jury instruction in a murder case stated that the instruction in question was "nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act" 164 U.S. at 496. This principle and its related usages have continued to be applied to carry the "reasonable doubt" burden in criminal law. See *Cramer v. United States,* 325 U.S. 1, 31 (1945); *Cox v. Louisiana,* 379 U.S. 559, 567 (1965).

In *Cramer, supra,* this Court aptly recognized the need for such a presumption (325 U.S. at 31):

> "What is designed in the mind of an accused never is susceptible of proof by direct testimony. If we were to hold that the disloyal and treacherous intention must be proved by the direct testimony of two witnesses it would be to hold that it is never provable. The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts."

The same need exists in cases like this one. "[T]here are very few cases of school segregation today in which the defendants admit that they had an improper intent." *United States v. Board of School Commissioners, supra,* 474 F.2d at 88; see also App. p. 43 (District Court opinion).

The natural, probable and foreseeable standard has also been approved by this Court in civil cases. See *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 485 (1940) (suit to recover damages for violation of the Sherman Act); *Radio Officers Union of the C.T.U., A.F.L. v. National Labor Relations Board,* 347 U.S. 17, 44-45 (1954) (complaint against employer for discriminating against non-union employees in violation of the National Labor Relations Act); *N.L.R.B. v. Great Dane Trailers, Inc.,* 388 U.S. 26, 33 (1967) (same).

The use of the presumption or *prima facie* case to shift the burden of proof is similarly a long-recognized principle which this Court, as well as lower Federal Courts, have seen fit to apply in numerous and diverse areas of the law, including cases involving racial discrimination. See *e.g., Missouri P.R. Co. v. Elmore & Stahl,* 377 U.S. 134, 138 (1964) (determination of shipper's liability for damage or loss to cargo); *United*

States v. Marine Bancorporation, 418 U.S. 602, 631 (1974) (determination that market is candidate for the potential completion doctrine of the Clayton Act in civil antitrust action); *N.L.R.B. v. Great Dane Trailers, Inc., supra,* 388 U.S. at 34 (1967) (determination of anti-union motiviation under §8 (a) (3) of the National Labor Relations Act); *Hernandez v. Texas,* 347 U.S. 475 (1954) (determination of racial discrimination in jury selection); *Turner v. Fouche,* 396 U.S. 346 (1970) (same); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) (racial discrimination in employment); *United States v. City of Black Jack,* 508 F.2d 1179 (C.A. 8, 1974), cert. denied, 422 U.S. 1042 (1975) (racial discrimination in housing); *Hodgson v. First Fed. Sav. and Loan,* 455 F.2d 818, 822-23 (C.A. 5, 1972) (age discrimination).

Indeed, Justice Stevens recognized the propriety of this approach in a race discrimination case in his concurring opinion in *Washington v. Davis,* 426 U.S. 229, 253 (1976):

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action. . . ."

This Court's decision in *Keyes, supra,* is based on similar considerations which led this Court to conclude that (*Keyes v. School District No. 1, Denver, supra,* 413 U.S. at 209):

> "In the context of racial segregation in public education . . . [There are] . . . a variety of situations in

> which 'fairness' and 'policy' require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated."

Indeed, all of the circuit courts which have considered questions of segregative intent in school desegregation cases since *Village of Arlington Heights* have found utilization of the "natural foreseeable consequences" rule consistent with *Village of Arlington Heights.* App. p. 177 (C.A. 8, 1977); *United States v. Texas Ed. Agency, etc.,* 564 F.2d 162, 168 (C.A. 5, 1977); *NAACP v. Lansing Bd. of Ed.,* 559 F.2d 1042, 1047 (C.A. 6, 1977), cert. denied, 46 U.S.L.W. 3390 (December 13, 1977). Other circuit courts had previously utilized a similar standard in ascertaining segregatory intent. *Hart v. Community School Board of Education,* 512 F.2d 37 (C.A. 2, 1975) Cf. *Morgan v. Kerrigan,* 509 F.2d 580 (C.A. 1, 1974), cert. denied 429 U.S. 963 (1975).

The system, however, cites three Ninth Circuit decisions to support its contention that a conflict exists in the Court of Appeals. Nothing in these decisions requires this Court to grant the writ.

In *Johnson* and *Soria,* the Court reversed and remanded district court decisions in which plaintiffs prevailed and which did not articulate correctly the requirement of segregative intent. *Johnson, supra,* 500 F.2d at 251; *Soria, supra,* 488 F.2d at 586. In addition, the district court in *Soria* had granted summary judgment on behalf of plaintiffs which, in effect, operated to

preclude a full trial on the intent underlying school board actions. *Soria, supra,* 488 F.2d at 586.*

Finally, *Berkelman v. San Francisco Unified School District,* 501 F.2d 1264 (1974), concerned a challenge to the admission standards of an academic high school under which a disproportionately small number of black students were admitted. The Court of Appeals stated that there "was no evidence that the Board's actions . . . were racially motivated [as] [t]he admission standard [was] neither an intentionally discriminatory standard . . ., nor a neutral standard applied in an intentionally discriminatory manner. . . ." 501 F.2d at 1266-67; citations omitted. In addition, the change in admission standards was accompanied by "development of a pilot minority admissions program" and the Court ruled that "[c]onditioning admission to Lowell upon the level of past academic achievement substantially furthers the district's purpose of operating an academic high school." 501 F.2d at 1267.

In conclusion, we do not assert that each Court of Appeals has utilized precisely the same analysis. This, indeed, would be a unique area of the law if that were the case. But, we do maintain that when all of the important factors are considered, there is no pattern of inconsistent decisions and, indeed, the pattern of deci-

*In *Soria,* the Court of Appeals did state that if the District Court accepted a foreseeability standard allowing a finding of segregative intent "regardless of any discriminatory motives behind . . . acts," it erred. 488 F.2d at 585. However, we emphasize again that *Soria* was a case decided on summary judgment where this procedure prevented the system from making a full defense.

sions, particularly since *Village of Arlington Heights,* is profoundly consistent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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